Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association

HIGH COURT (KUALA LUMPUR) – ORIGINATING MOTION NO R8-32-135-88
FAIZA TAMBY CHIK JC
16 JANUARY 1989

Administrative Law – Application for leave for order of certiorari to quash award and order of mandamus to the Industrial Court to hear and determine interpretation under s 33(1) of the Industrial Relations Act 1967 – Interpretation of provisions of collective agreement – Whether application frivolous and vexatious – Time bar – Rules of the High Court 1980, O 53 r 1(3)

In this case the applicant and the respondent were parties to the proceedings before the Industrial Court which led to the Industrial Court Award No 54/81 and the 1984 Collective Agreement. In the present application of the court, made under s 33(1) of the Industrial Relations Act 1967, the plaintiff asked the court to interpret art 34 of the aforesaid award and art 31 of the aforesaid agreement. The application was for leave of court to apply for an order of certiorari to quash the said award and also for an order of mandamus directing the Industrial Court to hear and determine the applicant's application dated 23 May 1988.

Held, dismissing the application for leave:

(1) As the application is not for an order of certiorari but rather for leave for such an order, the court must decide whether the matter to be decided by the court is frivolous and vexatious in the sense that it is a trivial complaint of an administrative error by a trade union.

(2) The question for interpretation sought by the applicant had already been raised by the applicant as a trade dispute and had been determined in Industrial Award No 324 of 1986, the *Oversea-Chinese Banking Corporation Ltd* v *Association of Bank Officers* case,[1] and as the matter has been adjudicated previously the application is in fact frivolous and vexatious.

(3) The application is also time-barred by virtue of the provisions of s 33A(3) of the Industrial Relations Act which requires such an application to be made within 30 days of the date on which the award was made.

(4) In order to merit the court's consideration, the application must comprise sufficient evidence to sustain a prime facie case that in delivering Award No 234/88 the Industrial Court had acted unlawfully or in excess of its powers. The applicant had not succeeded in proving either of those grounds. The application for leave is therefore dismissed.

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 02-2 of 1989.]

Cases referred to

1 *Oversea-Chinese Banking Corporation Ltd* v *Association of Bank Officers* [1986] 2 ILR 1370 (refd)
2 *Malayan Commercial Banks Association* v *Association of Bank Officers, Peninsular Malaysia* [1988] 1 ILR 280 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 22, 33(1), 33(5), 33A(3)
Rules of the High Court 1980 O 53 r 1(2), (3)

Anthony Nicholson for the applicant.

Cur Adv Vult

Faiza Thamby Chik JC: The applicant and the respondent were parties to the Industrial Court Award No 54/81 and the 1984 Collective Agreement. The coram of the court that decided the Award No 54/81 was:

(1) The Honourable Mr Justice Harun (as he then was),
(2) Mr S Sellapah,
(3) Encik Mohd Samsudin Shafie, KMN, and
(4) Mr Lim Fun Saw

and the effective date of the award was 1 February 1980. The applicant applied under s 33(1) of the Industrial Relations Act 1967 for interpretation of art 34 of Award No 54/81 and art 31 of the collective agreement. The interpretation sought by the applicant is brought under s 33 of the Industrial Relations Act 1967; and sub-s (5) reads as follows:

> The expression 'court' for the purpose of this section, means the court by which the award was made or any other court specially constituted under s 22 for the purpose.

Therefore s 33(5) requires the same coram as the one which made Award No 54/81. It is now impossible to convene that coram. The alternative is a court specially constituted under s 22 of the Act for the purpose. Under s 22(1), the constitution of a court is to deal with a trade dispute (not for a case on interpretation). Section 22(1) therefore cannot be used to specially constitute a court for a case on interpretation. The other subsections made provision for substitution of any panel members but not of the president. This gives rise to the unusual interpretation that once the president of the Industrial Court has been changed parties cannot apply for an interpretation under s 33 of the Act in respect of an award made by a coram with the ex-president as the deciding officer.

By an ex parte notice of motion, the applicant asks this court for an order that:

(1) leave be granted to apply for an order of certiorari to bring up and quash Industrial Court Award No 234 of 1988 dated 9 September 1988;
(2) leave be granted for an order of mandamus directed to the Industrial Court to hear and determine according to law the applicant's application for interpretation dated 23 May 1988 under s 33(1) of the Industrial Relations Act 1967 by a different division from that which made the said Award No 234 of 1988.

When the case first came up for hearing on 5 December 1988 in chambers, the court pointed out to counsel the provision of O 53 r 1(3) of the Rules of the High Court 1980 which reads:

> The applicant must give notice of the application for leave not later than the preceding day to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

The case came up for hearing again on 7 December 1988 in open court; and on that date, counsel for the applicant produced an affidavit of service dated 5 December 1988 served on the Attorney General's Chambers. Counsel for the applicant did not submit anything at the hearing except to rely on the statement made under O 53 r 1(2) dated 7 October 1988. The said counsel made neither submission nor produced any authorities. Accordingly, I am forced to consider this application for leave on the documents alone, ie materials which made up the tribunal record (encl 3), and after careful perusal of the materials, I dismissed the application.

I dismissed the application for the following reasons. At the outset, it must be pointed out that the application in the instant proceeding was not for an order. At this stage of the proceeding, the court is required only to inquire whether the matter to be decided by the court is not in fact frivolous and vexatious in the sense that it is a trivial complaint of an administrative error by a trade union of employees in the banking industry with a misguided sentiment and misconception of the law.

It is important in order to give a proper consideration of the nature of the relief sought at this initial stage to ask the following two questions: (1) what was the thing complained of ? and (2) why was it said to be bad? The answer to the first question was that the applicant complained of the Industrial Court Award No 234 of 1988 dated 9 December 1988; and to the second question, the answer was that in giving the said award, the Industrial Court had exceeded its jurisdiction and or acted without jurisdiction.

In his statement in reply, the respondent stated the interpretation sought by the applicant is art 34 of Award 54/81 and art 31 of the 1984 Collective Agreement; and the respondent submitted that this very question for interpretation had already been raised by the applicant as a trade dispute and has been determined by the Industrial Court in Award No 324 of 1986. Award No 324 of 1986 is between the *Oversea-Chinese Banking Corporation Ltd* v *Association of Bank Officers*,[1] and at p 1374 para 8, it states:

> Article 30(1)(a) is one of the provisions in the agreement which has been taken cognizance of by the court and by virtue of s 17(1)(a) of the Industrial Relations Act 1967, it is binding on the bank and the union and all workmen who are employed in the undertaking to which the agreement relates. Unless it is varied by a subsequent agreement or decision of the court, it shall be an implied term of the contract between the workmen and the employers bound by the agreement that the terms of employment are to be observed under the contract. The agreement has been given statutory recognition as a valid, binding and enforceable contract and it is only logical that it should specifically be enforced. Because of this, the agreement shall prevail. And because of this, the bank's retirement policy has, in the absence of any statutory protection, to take the back seat. The union knows this, otherwise it would not have raised this up at the MCBA/ABOM meeting on 14 and 15 April 1981 but unfortunately it did not actively pursue the matter to have the bank's retirement policy included on a personal-to-holder basis for those who are affected by it. In the absence of such a variation, we are of the view that the bank can require the claimants to retire in accordance with s 30(1)(a) of the agreement. We, therefore, hold that the claimant's retirement is not a termination of service without just cause or excuse. They were properly retired and as such we dismiss the union's case.

In the premises, I consider that as the matter has been adjudicated previously in Award No 324/86 as mentioned above, I therefore conclude that this application is in fact frivolous and vexatious.

The subsisting collective agreement is taken cognizance of by Award No 88 of 1988 which is between *Malayan Commercial Banks Association* v *Association of Bank Officers, Peninsular Malaysia*[2] where at p 281 it was held:

> (1) *Effective date and duration*:
> The union proposed that the award be backdated six months from the date of the minister's reference and be valid for a period of three years. The association asked that the award be effective from 1 January 1988 and be valid for a period of four years. The court orders that the award be effective from 1 January 1987 and expire after a four-year period on 31 December 1990.

Therefore, if the applicant is minded now to bring this matter up for an interpretation before this court, they will be held time-barred because s 33A(3) of the Industrial Relations Act states:

> An application under this section shall be made within thirty days of the date on which the award was made.

Anyway, this application has been left so late as to threaten the consistency and certainty which is thought necessary to good public administration.

Another requirement which the court has to consider at this stage of the proceeding is that the application must comprise sufficient evidence to sustain a prima facie case that the Industrial Court which made Award No 234/88 had acted unlawfully or ultra vires the power given to it under the Industrial Relations Act 1967. It is my considered opinion that the Industrial Court in this matter had acted within jurisdiction and had neither exceeded nor acted without jurisdiction. From what I have just stated above and after careful perusal of the materials placed before me in encl 3, I come to the conclusion that the very matter in question has been exclusively and contractually settled in Award No 324/86 and Award No 88/88. And a matter which is exclusively contractual in nature is not within the province of O 53 of the Rules of the High Court 1980. In a manner of speaking, those articles in Award No 324/86 and Award No 88/88 are derived exclusively from contract in the sense of rights of particular employees vis-à-vis their

employer. Order 53 of the Rules of the High Court 1980 cannot therefore be permitted for the enforcement of such private rights. Accordingly, I have come to the conclusion from the documentary evidence adduced in this application that the applicant has failed to produce sufficient evidence to sustain a prima facie case.

The application for leave is therefore dismissed.

Application dismissed.

Solicitors: *Lobo & Associates.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Padi bin Abdullah

HIGH COURT (LABUAN) – CRIMINAL TRIAL NO 24 OF 1984
MOHAMAD NOOR J
18 NOVEMBER 1988

Criminal Law – Dangerous drugs – Trafficking in – Ambush laid after tip-off from agent provocateur – Accused caught red-handed– Whether statutory presumptions of possession and trafficking rebutted – Accused denied carrying bag of drugs – Accused's story not reasonably true – Dangerous Drugs Act 1952, ss 37(d), (da)(vi) & 39B(1)(a)

Criminal Law – Dangerous drugs – Trafficking in – Agent provocateur – Cannot be considered as accomplice – Evidence of agent provocateur to be admissible and treated like any other evidence from any ordinary witness – Dangerous Drugs Act 1952, s 40A

The accused was charged with trafficking in 856.1 gm of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The prosecution's case was that on 11 February 1984, the police was informed by PW5, an agent provocateur, that the accused wanted to sell ganja to him. Upon receipt of such information, the police decided to lay a trap and in pursuit of the plan, an ambush was laid when the accused was seen carrying a plastic bag walking towards the arranged place. The seized bag was opened on the spot and found to contain cannabis. In his defence, the accused denied carrying the plastic bag at the time of the arrest but alleged that PW5 was carrying it and when PW5 ran away after the ambush, PW5 threw the bag to him.

Held, convicting the accused:

(1) On the facts, it is clear that the accused was caught red-handed to have in his custody or under his control the bag which contained the drug. Under s 37(d) of the Act, he shall thus be deemed to have in his possession the drug and to have known the nature of such drug until the contrary is proved. Further, having regard to the quantum, by virtue of s 37(da)(vi) he shall be presumed to be trafficking in the drug until the contrary is proved.

(2) The court has no reason to doubt the truth of the testimonies of the members of the police party. With regard to PW5, he is not an accomplice since he had made himself an agent for the prosecution before the actual commission of the offence. Generally, the court is always wary in accepting the evidence of an agent provocateur but in this case, the legislature, under s 40A of the Act, had provided that the evidence of any agent provocateur shall be admissible and treated like any other evidence from any ordinary witness.

(3) The court did not consider the accused's story to be reasonably true or consistent with his innocence. The accused had not rebutted the statutory presumptions on the balance of probabilities.

[*Editorial Note*: The accused has appealed to the Supreme Court vide Criminal Appeal No 99 of 1988.]

Case referred to
1 *Sathasivam & Ors* v *PP* [1949] MLJ 71 (refd)

Legislation referred to
Dangerous Drugs Act 1952 ss 2, 37(d),(da)(vi), 39B(1)(a), 40A

Abdul Gani Patail (Deputy Public Prosecutor) for the Public Prosecutor.
PK Lim for the accused.

Cur Adv Vult

Mohamad Noor J: The accused was charged as follows:

> That you on the 12th day of February 1984, at about 9 pm, in front of the Ann Kwai Club, Jalan Kenanga, in the Federal Territory of Labuan, Malaysia, did traffic in a dangerous drug to wit 856.1 gm of cannabis on your own behalf and that you thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s 39(2) of the said Act.

This is the case for the prosecution. On 11 February 1984, at about 7.30 pm the police was informed by PW5 that the accused wanted to sell ganja to him. Upon receipt of such information, the police decided to lay a trap. In pursuit thereof, a plan was made for PW5 to arrange for the sale to take place somewhere near Ann Kwai Club, Jalan Kenanga, Labuan. On 12 February 1984 at about 7 pm, a party of police officers, led by PW2, laid an ambush in front of Ann Kwai Club. Visibility was good. At about 9 pm, the accused and PW5 were seen walking abreast coming from the direction of Labuan Emporium and heading towards Ann Kwai Club. The accused was seen carrying a plastic bag. After a signal from PW5, the police party closed in and PW6 arrested the accused and seized the bag from him. PW5 ran away as planned. The bag was opened on the spot and found to contain cannabis, the subject matter of the charge.

On the facts, it is manifestly clear that the accused was caught red-handed to have in his custody or under his control the bag which contained the drug. That being the case, by reason of the provisions of s 37(d) of the Act, he shall be deemed to have in his possession the drug and to have known the nature of such drug, until the contrary is proved. Further, having regard to the quantum, by virtue of the provisions of s 37(da)(vi) he shall be pre-